Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

(2)

No. 95-668

In the Supreme Court of the United States

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

30 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer may not vitiate the agreement by asserting that, based on information known to the employer before the union accepted the offer, the employer had a good-faith doubt that, at the time of acceptance, the union had the support of the majority of the employees whom it was certified to represent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Belcon, Inc, 257 N.L.R.B. 1341 (1981)	3
Bickerstaff Clay Products Co. v. *NLRB*, 871 F.2d 980 (11th Cir.), cert. denied, 493 U.S. 924 (1989)	15
Big Three Industries, Inc., 201 N.L.R.B. 197 (1973)	12
Bolton-Emerson, Inc., 293 N.L.R.B. 1124 (1989), enforced, 899 F.2d 104 (1st Cir. 1990)	7
Brooks v. *NLRB*, 348 U.S. 96 (1954)	6
Bryan Memorial Hosp. v. *NLRB*, 814 F.2d 1259 (8th Cir.), cert. denied, 484 U.S. 849 (1987)	8
Chicago Tribune Co., 303 N.L.R.B. 682 (1991), enforcement denied, 965 F.2d 244 (7th Cir. 1992)	11
Chicago Tribune Co. v. *NLRB*, 965 F.2d 244 (7th Cir. 1992)	10, 11, 12
Fall River Dyeing & Finishing Corp v. *NLRB*, 482 U.S. 27 (1987)	6, 7, 8, 10, 14
Hickinbotham Bros. Ltd., 254 N.L.R.B. 96 (1981)	10
International Ladies' Garment Workers' Union v. *NLRB*, 366 U.S. 731 (1961)	5, 10
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990)	6, 7, 15
NLRB v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978)	6
NLRB v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979)	8

Cases—Continued: Page

NLRB v. *Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995) 8
North Bros. Ford, Inc., 220 N.L.R.B. 1021 (1975) 3
Premium Foods, Inc. v. *NLRB*, 709 F.2d 623 (9th Cir. 1983) 7
Rock-Tenn Co. v. *NLRB*, 69 F.3d 803 (7th Cir. 1995) 14
Terrell Machine Co. v. *NLRB*, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970) 7
Viking Lithographers, 184 N.L.R.B. 139 (1970) 15

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3
§ 8(a)(2), 29 U.S.C. 158(a)(2) 5, 13, 14
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 4
§ 9(c)(1)(A)(ii), 29 U.S.C. 159(c)(1)(A)(ii) 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-668

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-8a) is reported at 60 F.3d 24. The supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 9a-58a) is reported at 317 N.L.R.B. No. 60.

The earlier opinion of the court of appeals remanding the case to the Board (Pet. App. 59a-83a) is reported at 980 F.2d 804. The initial decision and order of the Board (Pet. App. 84a-89a) and the decision of the administrative law judge (Pet. App. 90a-120a) are reported at 303 N.L.R.B. 562.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1995. The petition for a writ of certiorari was filed on October 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner (the Company) operates an iron fabrication shop in Hudson, Massachusetts. At relevant times, the Company had approximately 23 production and maintenance employees. In 1977, the National Labor Relations Board (Board) certified Shopmen's Local No. 501, a/w International Association of Bridge, Structural, and Ornamental Iron Workers (the Union), as the collective bargaining representative of those employees. Since then, the parties have executed successive collective bargaining agreements. Pet. App. 10a-11a, 60a-61a, 95a.

On September 21, 1988, four days before the agreement then in effect was to expire, the Company and the Union began negotiations for a new agreement. The negotiations were unsuccessful. On October 14, 1988, the employees went out on strike. Negotiations continued during the strike. On November 17, 1988, the Company presented a contract proposal to the Union. On that date, the Union neither accepted nor rejected the proposal, and the Company took no action to withdraw its offer. Pet. App. 11a, 61a-62a, 95a-98a.

On November 27, 1988, the Union told the Company that its November 17 contract proposal had been accepted by the Union, that the strike had ended, and that the employees would return to work. Pet. App. 63a. On November 28, 1988, however, the Company sent the Union a telegram stating in pertinent part (*id.* at 64a): "Employer now has reason to believe that

[the Union] no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations." The Company based its alleged belief that the Union no longer represented a majority of the unit employees on, among other things, assertions that nine of the 23 unit employees crossed the picket line during the strike; that 13 unit employees resigned from the Union; and that 16 unit employees stated to managerial or supervisory personnel that they and their coworkers no longer supported the Union. *Id.* at 72a. Those events allegedly occurred before the Union's November 27 acceptance of the Company's proposal. *Id.* at 12a.

2. In its initial decision, the Board found that the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5), by refusing to execute a written contract with the Union and by withdrawing recognition from it. Pet. App. 84a-120a. The Board refused to consider the Company's contention that it had a good-faith doubt that the Union had majority support when it accepted the Company's outstanding contract offer. Relying on *Belcon, Inc.*, 257 N.L.R.B. 1341, 1346 (1981), and *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021, 1022 (1975), the Board explained that, "under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a[n] [employer's] alleged good-faith doubt of the union's majority status." Pet. App. 85a n.2.

On the Board's application for enforcement of its order, the court of appeals upheld the Board's finding that the Company's contract offer remained open at the time the Union accepted it, and that membership

ratification was not required for acceptance. Pet. App. 68a-71a, 83a. The court remanded the case, however, for an explanation of "whether and why the [Company] should not be allowed to try to show that, at the time of the Union's purported acceptance of the Company's outstanding offer, the Union was lacking in majority support and therefore incapable of creating by its acceptance a valid contract." *Id.* at 83a.

3. On remand, the Board reaffirmed its prior rule that, "where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement." Pet. App. 28a. The Board accordingly concluded that "an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point [*i.e.*, after the union's acceptance] violates Section 8(a)(5) of the Act," and that "the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance." *Ibid.*

The Board explained that its conclusion was supported by the case law construing Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), as well as by practical and policy considerations. Pet. App. 28a-37a. The Board determined that it was "inconsistent with the concept of good-faith bargaining" embodied in the case law "to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt

of the union's majority support based on grounds that it knew existed prior to the formation of the contract." *Id.* at 29a. In rejecting such a rule, the Board observed that "[t]he employer controls whether or when its doubt [as to the majority's continued majority support] will be asserted." *Id.* at 32a. The Board also determined that "a determination of the critical issue of whether an employer had a reasonable doubt, held in good faith but not articulated, at an earlier unspecified time—presumably prior to the union's acceptance of the employer's contract offer—would involve an inquiry into matters too speculative and subjective not only to vitiate that contract but to dissolve the bargaining relationship." *Ibid.* (internal quotation marks omitted).

The Board further explained that its conclusion was not inconsistent with Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), which prohibits an employer from recognizing a minority union even if the employer believed in good faith that the union represented a majority of the employees. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). The Board observed that the Union in this case "was not recognized unlawfully, but was the certified representative of [petitioner's] unit employees"; moreover, it "was operating under a rebuttable presumption of continued majority support" that was unchallenged at the time it accepted petitioner's contract offer. Pet. App. 40a-41a.

Finally, the Board emphasized that it was making a "policy choice" in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an alleged good-faith doubt." Pet. App. 53a (emphasis omitted).

The Board determined that "the stability resulting from" its rule "outweighs [the rule's] potential adverse impact on employee freedom of choice." *Ibid.*

4. The court of appeals enforced the Board's order, holding that "the Board's policy choice is reasonable and, as now articulated, quite persuasive." Pet. App. 6a, 8a.

ARGUMENT

1. A union that is certified after winning a Board-conducted election ordinarily enjoys an irrebuttable presumption that it is supported by a majority of employees during the year after its certification and during the term—for up to three years—of any collective bargaining agreement to which it is a party. After the certification year or the collective-bargaining agreement expires, the presumption of majority status continues, but becomes rebuttable. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 343 n.8 (1978) (term of contract); *Brooks* v. *NLRB*, 348 U.S. 96, 101-104 (1954) (certification year).[1] Those "presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision." *Fall River*, 482 U.S. at 38. They further the Act's policy of "industrial peace" by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees." *Ibid.* (citation omitted). They "also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*

This case involves the application of those principles to a narrow set of circumstances: A previously certified union accepted an employer's contract offer; after acceptance, the employer asserted a good-faith doubt that the union had majority status at the time of acceptance; in support of that assertion, the employer relied on evidence known to it prior to acceptance. The question is whether the Board reasonably concluded that, in those circumstances, the employer could not rebut the union's presumptive majority status.[2] The court of appeals correctly held that the

[1] An employer may rebut the presumption of majority status by establishing that, at the time of its refusal to bargain with the union, either a majority of the employees did not in fact support the union or the employer had a good-faith, objectively reasonable doubt about the union's majority status. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990). Here, the Board emphasized that petitioner sought to establish only a good-faith doubt that the Union retained majority support. Pet. App. 17a n.16. In addition, the Board reaffirmed "the principle that a union and an employer are not permitted to continue bargaining if the union actually lost its majority status and the employer and the union are aware of this actual loss." *Id.* at 54a & n.76.

[2] The Board did not decide whether the Company had submitted sufficient evidence to support a reasonable, good-faith doubt about the Union's majority status. Pet. App. 34a. It is well settled, however, that an employee's crossing a union picket line does not necessarily signify a repudiation of the union. *Curtin Matheson*, 494 U.S. at 789. Furthermore, proof that employees desire to withdraw from union membership is not tantamount to proof of a repudiation of the union as a bargaining agent. See, *e.g.*, *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 631 (9th Cir. 1983); *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124, 1127 (1989), enforced, 899 F.2d 104 (1st Cir. 1990). Moreover, the evidence upon which the Company relied was hearsay and reflected only

Board's conclusion, which was based in significant part on policy considerations that Congress entrusted the Board to evaluate, was well within its discretion. Pet. App. 6a (citing *Fall River*, 482 U.S. at 42); see also *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995) ("[T]his Court's decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application.").

As the Board reasoned, if an employer were permitted to "sit" on its doubt about the union's majority status until after the union had accepted the employer's contract offer, it could "unilaterally" vitiate an agreement not to its liking. Pet. App. 36a. The union would thereby be denied the period of repose afforded by the presumption of majority support during the contract term. See *Fall River*, 482 U.S. at 38 (presumption of majority status during contract term "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support"). That result is particularly unfair, and at odds with the Act's policy of promoting "industrial peace" (*ibid.*), when, as here, the union may have abandoned an unsuccessful strike in the belief that it could still obtain a contract (albeit on the employer's terms). In

management evaluation of employee sentiment. *Bryan Memorial Hosp.* v. *NLRB*, 814 F.2d 1259, 1262 (8th Cir.), cert. denied, 484 U.S. 849 (1987); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 305-306 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

that situation, the union's need for a period of repose may be especially great, since the unsuccessful strike may have weakened its relationship with the employees.

Moreover, as the Board noted (Pet. App. 32a-33a), it is often difficult to evaluate employer assertions of good-faith doubt made after the parties have reached an agreement. In such cases, the employer's objective actions during the bargaining process—including its failure to withdraw the contract offer prior to its acceptance—indicate that the employer accepted the union as a proper bargaining representative. The demonstration of a good-faith doubt after acceptance "becomes amenable to post-hoc reasoning and self-serving interpretations." *Id.* at 36a-37a.

The Board's decision, while protecting the legitimate interests of unions, also recognizes those of employers. The employer has control of "whether or when its doubt will be asserted." Pet. App. 32a. The Board's decision merely requires that, "if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer." *Id.* at 33a.[3] When the employer does so, its assertion of a lawful good-faith doubt is a "changed circumstance" that vitiates the outstanding offer. *Ibid.* In addition, the employer may withdraw its offer at any time prior to the union's acceptance for any lawful reason, including because of a reasonable, good-faith doubt about the

[3] The Board also left open "the possibility that an employer may be permitted to raise a good-faith doubt that developed contemporaneously with a union's purported acceptance of its offer." Pet. App. 54a.

union's majority support. See *Hickinbotham Bros. Ltd.*, 254 N.L.R.B. 96, 102 (1981) ("It is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires.").

The Board's decision also respects the rights of employees. They remain free to file a decertification petition at any time after the contract has expired and before the union accepts an outstanding offer by the employer for a new contract. See 29 U.S.C. 159(c)(1)(A)(ii).

2. Petitioner's principal contention (Pet. 10) is that the decision below conflicts with the Seventh Circuit's decision in *Chicago Tribune Co.* v. *NLRB*, 965 F.2d 244 (1992). There is no conflict.

In *Chicago Tribune*, the Seventh Circuit held that, after a union had accepted the employer's contract offer, the employer could assert that the union lacked majority support at the time of acceptance. 965 F.2d at 250. In so holding, the Seventh Circuit relied on *Fall River*, 482 U.S. at 51 n.18, and *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), for the proposition that "the law forbids a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit." *Chicago Tribune*, 965 F.2d at 249-250 (citation omitted).

Neither that proposition nor the holding in *Chicago Tribune* is applicable here. Petitioner did not know that the Union had lost majority support when petitioner refused to acknowledge the Union's acceptance of its offer. Petitioner had, at most, a good-faith doubt about the Union's majority status. See note 2, *supra*. Indeed, petitioner has never asserted—and neither

the Board nor the court of appeals has ever found—that the Union in fact lacked majority support at the time of acceptance. See note 1, *supra*. In contrast, the Seventh Circuit in *Chicago Tribune* understood the employer to have based its refusal to sign an agreement with the union on its knowledge that the union had in fact lost majority support at the time of acceptance. 965 F.2d at 248 ("The company * * * refused to sign the collective bargaining agreement, on the ground that the union no longer represented a majority of the workers.").[4] Furthermore, the Seventh Circuit determined that such a loss of majority support had in fact occurred. *Id.* at 250 ("it became clear that the union had lost the support of the workers"). Thus, the Seventh Circuit held that the Board's rule—"that a union's unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed"—does not "apply to a case such as this where between the original offer and its renewal the

---

[4] The Seventh Circuit appears to have misunderstood the basis for the employer's refusal to acknowledge the union's acceptance of the employer's contract offer. The Board found that the employer based its refusal on its "good-faith doubt of the Union's continued majority," not on its knowledge of an actual loss of majority support. 303 N.L.R.B. 682, 686 (1991). The Seventh Circuit's apparent mischaracterization of the basis for the employer's action may well have been influenced by the facts of the case, which, in contrast to those of this case, strongly suggested an actual loss of majority support for the union. At the time the employer refused to acknowledge the union's acceptance, none of the strikers had returned to work, a decertification petition had been filed with the Board, and two-thirds of the replacement workers had signed a petition stating that they did not want union representation. *Ibid.*

union lost the support of the workers." *Ibid.* That holding does not conflict with the decision in this case, in which there was neither an assertion by the employer nor a finding by the Board or the court of appeals that the Union had actually lost the support of the majority of the workers.

Chicago Tribune is also distinguishable because the employees in that case, unlike those involved here, had filed a petition to decertify the union. The Seventh Circuit attached significance to the fact that, pursuant to its "blocking-charge rule," the Board would not rule on the decertification petition pending its resolution of subsequently filed unfair labor practice charges. *Chicago Tribune*, 965 F.2d at 249, 250.[5] The Seventh Circuit observed that the employees were therefore locked into representation "by a union that they emphatically do not want to represent them." *Id.* at 250. The blocking-charge rule did not apply here, because no unfair labor practice charges were filed before the Union accepted petitioner's contract offer and petitioner withdrew recognition from the Union. Thus, the employees were free from the time the contract expired (September 25, 1988) until the Union accepted petitioner's contract offer (November 27, 1988) to file a decertification petition. The employees did not do so, however, and there was no other evidence that they did not want the Union to represent them.

[5] Under its blocking-charge rule, the Board ordinarily will not process a decertification petition when there are unresolved unfair labor practice charges that, if sustained, would preclude a fair election. See *Big Three Industries, Inc.*, 201 N.L.R.B. 197, 197-198 (1973).

The decisions on which *Chicago Tribune* relied are also inapposite here. Neither *Fall River* nor *Garment Workers'* addressed whether a contract with a union that enjoyed the presumption of majority status can be challenged after acceptance based only on the employer's preexisting doubt about the union's majority status at the time of acceptance.

Garment Workers' held that an employer violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by voluntarily recognizing an organizing union that had not gained the support of a majority of the employees. As the Board in this case explained, that holding was based on "Congress' goal in enacting Section 8(a)(2) [of] preserv[ing] for employees the right to choose their bargaining representative free of employer interference or coercion"; "the violation found [in *Garment Workers*'] was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees." Pet. App. 40a. Here, by contrast, the Union "was the certified representative of the [Company's] unit employees"; it "was operating under a rebuttable presumption of continued majority support" that "was unchallenged at the time of acceptance" of petitioner's contract offer; and, at that time, "there was no legally cognizable evidence that continued bargaining would involve dealing with a minority union." *Id.* at 40a-41a. The Board reasonably concluded that, under those circumstances, "the aim of Congress in enacting Section 8(a)(2)—to prevent employers from foisting representatives on unwilling employees—is not frustrated by the presumption's protection of the status of [a] certified incumbent union against post-hoc attack." *Id.* at 41a (footnote omitted).

In *Fall River*, this Court suggested that a successor employer might violate Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), if it recognized the incumbent union before a "substantial and representative complement" of employees had been hired. 482 U.S. at 51 n.18. The basic teaching of *Fall River*, however, was that, once the successor has hired a representative complement of employees, and a majority of that complement consists of employees who had worked for the predecessor, the union's rebuttable presumption of majority status continues into the new relationship. *Id.* at 46-52. The present case, of course, does not involve the question whether the presumption of majority status is affected by some event, such as a successorship. Here, there can be no doubt that the Union enjoyed a rebuttable presumption of majority support among a representative complement of petitioner's employees at the time the Union accepted petitioner's contract offer.

Finally, any tension between the decision below and *Chicago Tribune* would not, in any event, warrant this Court's attention at this time. As noted (see note 4, *supra*), the facts in *Chicago Tribune*, which differ significantly from those of this case, appear to have caused the Seventh Circuit in *Chicago Tribune* to misunderstand the relevant legal issue. Furthermore, as the court below noted (Pet. App. 7a), the Seventh Circuit in *Chicago Tribune* was "without the benefit of the Board's present analysis." Accordingly, there is reason to believe that the Seventh Circuit would limit or qualify its holding in *Chicago Tribune* should another case similar to the present one involving the Board's rule arise in that Circuit. Cf. *Rock-Tenn Co.* v. *NLRB*, 69 F.3d 803, 810 (7th Cir. 1995) ("where * * * the company's unfair labor

practices deprived the Union of its certification year protections, it is certainly appropriate to grant the Union an additional six months to resurrect the bargaining process," even though "the extension imposes a potential burden on employee free choice since it reinstates the irrebuttable presumption of majority support for another six months").

3. There is no merit to petitioner's contention (Pet. 10) that the decision of the court below is inconsistent with *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), and *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir.), cert. denied, 493 U.S. 924 (1989). In those cases, a good-faith doubt about the union's majority status was asserted by the employer after the union's acceptance of the employer's contract offer. In neither case, however, did the parties litigate the timeliness of the employer's assertion of a good-faith doubt. Instead, the parties framed the issue as whether the employer had demonstrated a good-faith doubt, and, in particular, whether the employer could rely on a presumption that striker replacements do not support the union. See Pet. App. 55a-56a.[6] Thus, neither *Curtin Matheson* nor *Bickerstaff* addressed the question presented here.[7]

---

[6] In *Curtin Matheson*, this Court held that the Board had reasonably rejected such a presumption. 494 U.S. at 786-796.

[7] Petitioner's reliance (Pet. 20 n.2) on *Viking Lithographers*, 184 N.L.R.B. 139 (1970), is also misplaced. As the Board noted in this case (Pet. App. 26a n.31), the parties in *Viking Lithographers*, unlike those here, had not reached a binding agreement when the employer sought to withdraw recognition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board

DECEMBER 1995